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Guy M. Hicks
General Counsel

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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth*
Docket No. 99-00662

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion to Compel. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re:)
)
Petition of MCI WorldCom to Enforce) Docket No. 99-00662
Interconnection Agreement with BellSouth)

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO COMPEL

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") hereby moves the Tennessee Regulatory Authority ("Authority") for an order compelling MCI WorldCom, Inc. ("MCI WorldCom") to respond fully and completely to BellSouth's Interrogatories 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 21, 22, 23, and 25, as well as Requests For Production of Documents 3, 4, 5, 6, and 7.

While BellSouth regrets having to involve the Authority in any discovery dispute, BellSouth has no choice here. This case involves significant issues, and a considerable amount of money is at stake. Yet, MCI WorldCom has made little effort to comply with its discovery obligations. In fact, despite being served with comprehensive document requests by BellSouth, MCI WorldCom has not produced a single internal memorandum, e-mail, note or document of any sort relating to the issues in this case, except one spreadsheet prepared in recent weeks.

Instead, MCI WorldCom has either not answered the questions BellSouth asked or objected to BellSouth's discovery requests -- objections that are without merit. MCI WorldCom's unduly restrictive view of its discovery obligations should be summarily rejected, and MCI WorldCom should be ordered to provide complete responses to BellSouth's discovery requests as more fully discussed below.

INTERROGATORIES

Interrogatory No. 7:

Do you contend that there is a difference between the place where a call "terminates" for jurisdictional purposes and the place where a call "terminates" for reciprocal compensation purposes? If the answer to the foregoing is in the affirmative, please:

- (a) explain in detail the distinction between call termination for jurisdictional and reciprocal compensation purposes;
- (b) state the date and describe the circumstances when MCI WorldCom first concluded that there was a distinction between call termination for jurisdictional and reciprocal compensation purposes;
- (c) state the date and describe the circumstances when MCI WorldCom first stated publicly that there was a distinction between call termination for jurisdictional and reciprocal compensation purposes; and
- (d) identify all documents that refer or relate to or support a distinction between call termination for jurisdictional and reciprocal compensation purposes.

Response:

Section 2.2 of Attachment IV of the Agreement between between (sic) BST and MCI states that local traffic is defined as "any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange." For purposes of interpreting the Agreement MCI WorldCom understands that language to mean that if the NPA-NXX to NPA-NXX of the calling and called party is a local call as defined by BST's local tariff, it is rated as a local call under the Agreement and BST is invoiced for reciprocal compensation for that call. If the call should be rated as a toll call based on the NPA-NXX of the calling to called party, MCI WorldCom will invoice BST for terminating switched access charges. MCI WorldCom objects, on the grounds of relevancy, to questions concerning the meaning of "terminate" for any purpose other than the proper interpretation of the Agreement.

BellSouth's Interrogatory asks a basic question to better understand MCI WorldCom's contentions in this case – a question MCI WorldCom never answers. Other parties have theorized that in interpreting the word "terminate" in an interconnection agreement, a distinction must be drawn between call "termination" for reciprocal compensation and call "termination" for

jurisdictional purposes. BellSouth simply seeks to learn whether MCI WorldCom subscribes to the same theory, which is obviously relevant to understanding MCI WorldCom's views concerning the "proper interpretation" of the parties Interconnection Agreement. No basis exists for MCI WorldCom not providing the requested information, and MCI WorldCom should be compelled to do so.

Interrogatory No. 8:

State the number of ISP minutes of use from BellSouth to MCI WorldCom in Tennessee for each month since April 1997 for which MCI WorldCom is seeking the payment of reciprocal compensation.

Response:

MCI WorldCom does not track or otherwise segregate ISP traffic and the interconnection agreement between MCIM and BST does not require such tracking or segregation. MCI WorldCom is seeking payment of reciprocal compensation for local calls made by BST's customers to customers of MCIm, regardless of the business that the MCIm customer is engaged in.

Interrogatory No. 9:

For each month since April 1997, state how many of the ISP minutes of use from BellSouth to MCI WorldCom in Tennessee you contend "terminated" for jurisdictional purposes in the local calling area.

Response:

See responses to questions 7 and 8.

Interrogatory No. 10:

In answering the foregoing interrogatory, please explain in detail the basis for your contention and identify all documents that support or refer or relate to such contention.

Response:

See responses to questions 7 and 8.

Interrogatory No. 11:

For each month since April 1997, state how many of the ISP minutes of use from BellSouth to MCI WorldCom in Tennessee you contend "terminated" for reciprocal compensation purposes in the local calling area.

Response:

See responses to question 8.

Interrogatory No. 12:

In answering the foregoing interrogatory, please explain in detail the basis for your contention and identify all documents that support or refer or relate to such contention.

Response:

See responses to questions 7 and 8.

Through these Interrogatories, BellSouth is seeking to discover the amount of the ISP minutes of use for which MCI WorldCom is demanding the payment of reciprocal compensation. Such information is directly relevant to this case, and MCI WorldCom does not contend otherwise. MCI WorldCom is demanding the payment of reciprocal compensation from BellSouth for tens of millions of minutes of use, some portion of which (albeit a significant one) is attributable to ISP traffic. BellSouth is entitled to discover the specific amount of those minutes at issue in this case. Obviously, if BellSouth prevails in this proceeding, MCI WorldCom would be forced to identify the ISP minutes of use and to exclude those minutes from its invoices to ensure that BellSouth does not pay reciprocal compensation for ISP traffic.

MCI WorldCom's claim that it "does not track or otherwise segregate ISP traffic" misses the point. Presumably, MCI WorldCom has the telephone numbers that it has assigned to the ISPs it serves in Tennessee and has been recording the number of and duration of calls to those

numbers in its switches. Nothing more is required to respond to BellSouth's discovery requests. To the extent MCI WorldCom contends otherwise, MCI WorldCom should be directed to explain in detail what would be involved in gathering the information requested by BellSouth and to demonstrate why it should be excused from providing such obviously relevant information.

Interrogatory No. 16:

Identify the number of MCI WorldCom's total customers in Tennessee, and separately identify the number of those customers that are (1) Internet Service Providers ("ISPs"); and (2) business customers other than ISPs; and (3) residential customers.

Response:

MCI WorldCom objects on the grounds that the information sought is not relevant nor would it lead to the discovery of relevant information. The resolution of this Complaint involves the determination of whether, under the Agreement, calls to ISPs should be treated as local calls for purposes of payment of reciprocal compensation. The information sought is irrelevant to that issue.

Interrogatory No. 17:

For the ISP customers identified in response to Interrogatory No. 16, state, on an annual basis since 1997, (a) the total amount billed by MCI WorldCom for service to those customers from inception of service to present; (b) the amounts of any credits, rebates, or adjustments given to such customers; and (c) the total amount of revenue collected from such customers, from inception of service to present.

Response:

See response to question 16.

Interrogatories Nos. 16 and 17 seek information concerning the extent to which MCI WorldCom has targeted ISPs and has offered "price breaks" in order to secure ISP business. Such information is directly relevant to the issues in this proceeding. For example, assume that MCI WorldCom did not offer any credits or refunds in an attempt to attract ISP customers in

1997 (when the Interconnection Agreement was executed), but then subsequently began offering such credits or refunds in 1999. Such evidence would shed light on MCI WorldCom's original intent and could be used by BellSouth to demonstrate that MCI WorldCom did not see the need to entice ISP customers because it did not expect to receive reciprocal compensation payments when the Interconnection Agreement was executed.

Furthermore, if MCI WorldCom is purposefully engaging in transactions with ISP customers designed to generate reciprocal compensation, such as giving ISPs service for free or deeply discounting service to ISPs, this Authority should consider whether awarding reciprocal compensation for ISP traffic under such circumstances is in the public interest. In somewhat analogous circumstances, the Federal Communications Commission has found that calls placed by payphone providers using auto-dialing machines in order to generate commission payments were against public policy and adopted rules prohibiting the practice. *See* Report and Order, Docket Nos. 96-128, 91-35, ¶ 65 (Sept. 20, 1996). BellSouth should be entitled to discover the facts necessary for the Authority to make a similar determination. This is particularly true if the information requested tends to show that MCI WorldCom's reciprocal compensation request is nothing more than a subsidy designed to support discounted service to ISP providers, while lining MCI WorldCom's pockets. Given that parties in Tennessee are generally allowed liberal discovery, there is no reason why MCI WorldCom should not be required to provide the requested information.

Interrogatory No. 18:

Does MCI WorldCom own or have an interest in an ISP in Tennessee? Is MCI WorldCom affiliated in any way with an ISP in Tennessee (other than a customer relationship)? If so, explain in full the nature of such interest or affiliation and identify all documents that refer or relate to such interest or affiliation.

Response:

See response to question 16.

Interrogatory No. 19:

If the response to Interrogatory No. 18 is in the affirmative, state the percentages of reciprocal compensation that MCI WorldCom is claiming in this proceeding that was generated from calls to ISPs owned by or affiliated with MCI WorldCom, or in which MCI WorldCom has an interest in Tennessee.

Response:

Not applicable.

For reasons not readily apparent, MCI WorldCom has objected to providing any information concerning the extent to which the reciprocal compensation it seeks to this proceeding is related to ISPs in which MCI WorldCom has an interest. The requested information is relevant to ascertaining the intent of the parties. For example, if MCI WorldCom did not own an ISP or have any financial interest in an ISP in 1997, such evidence may be used to underscore the lack of any mutual agreement on the part of BellSouth and MCI WorldCom to pay reciprocal compensation for ISP-bound traffic when the parties executed their Interconnection Agreement in 1997. By contrast, if MCI WorldCom did own an ISP or have a financial interest in an ISP in 1997, BellSouth will be able to argue that MCI WorldCom should have affirmatively raised the ISP issue when the parties were negotiating the Interconnection Agreement, which MCI WorldCom did not do. While MCI WorldCom may be reluctant to provide information about its intra-company operations, such information is relevant and should be produced.

Interrogatory No. 21:

For each year beginning in 1997, state, on an annual basis, the total revenues MCI WorldCom earned or expects to earn from its ISP customers in Tennessee.

Response:

See response to question 16.

Interrogatory No. 22:

For each year beginning in 1997, state, on an annual basis, the total revenues MCI WorldCom earned or expected to earn from its end-user customers, including ISPs, in Tennessee.

Response:

See response to question 16.

Interrogatory No. 22A:

State the total number of end user customers that MCI WorldCom serves in Tennessee, including the number of equivalent access lines for which these customers account.

Response:

See response to question 16.

Interrogatory No. 23:

State the total number of ISP customers that MCI WorldCom serves in Tennessee, including the number of equivalent access lines for which these customers account.

Response:

See response to question 16.

Furthermore, MCI does not maintain or otherwise segregate in its customer records whether the customer is an ISP.

The information sought through these Interrogatories is relevant to a determination whether awarding the payment of reciprocal compensation for ISP traffic under the facts of this

case is in the public interest – a determination the Authority can and should make. The Louisiana Public Service Commission recently considered the public interest in denying a claim for reciprocal compensation by KMC Telecom, Inc. ("KMC"). *See* Order No. U-23839, *KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*, Docket No. U-23839 (La. Public Serv. Comm'n Oct. 28, 1999). In that case, KMC had billed BellSouth approximately 340% more in reciprocal compensation that KMC expected to receive in revenue from providing service to its ISP customers. According to the Louisiana Commission, "The negative impact on competition in the local market as well as the potential for abusing the reciprocal compensation obligation from permitting such an arrangement are obvious." BellSouth is entitled to discover whether MCI WorldCom is engaged in similar tactics.

Interrogatory No. 25:

Was the definition of "local traffic" the subject of discussion between MCI WorldCom and BellSouth in negotiating the Interconnection Agreement? If so, describe with particularity those discussions and identify all documents that refer or relate to those discussions.

Response:

"Local traffic" is defined in section 2.2.1 of Attachment IV of the interconnection agreement between MCI and BST. That language was proposed by BellSouth and accepted by MCI.

MCI WorldCom never answers the question BellSouth has asked. Regardless of who proposed the definition of "local traffic," BellSouth is entitled to discover whether this definition was ever discussed by the parties and, if so, the details of those discussions. MCI WorldCom should be compelled to provide this information.

REQUESTS FOR PRODUCTION

Request No. 3:

Produce all documents that refer or relate to or support MCI WorldCom's contention that it understood calls to Internet Service Providers ("ISPs") to be "local traffic" under the Interconnection Agreement.

Response:

MCI WorldCom objects on relevancy grounds to producing any documents that are not reasonably contemporaneous with the signing of the Agreement. MCI WorldCom is aware of no documents that reflect MCI WorldCom's understanding or position on the issue of reciprocal compensation at the time the Agreement was executed. Should MCI WorldCom discover such documents it will disclose them. Documents generated either prior to or subsequent to the execution of the interconnection agreement are not relevant because the issue to be decided in this proceeding is the intent of the parties at the time the interconnection agreement was executed.

Request No. 4:

Produce all documents that refer or relate to or support MCI WorldCom's contention that it understood that calls to ISPs "terminate" at the ISP under the Interconnection Agreement.

Response:

See previous response.

Request No. 5:

Produce all documents that support or refer or relate to MCI WorldCom's allegations in the Complaint, including, but not limited to, all documents created prior to September 1, 1997 reflecting MCI WorldCom's belief that it would be receiving reciprocal compensation from BellSouth for ISP traffic.

Response:

See previous response.

MCI WorldCom claims it has no documents "that reflect MCI WorldCom's understanding or position on the issue of reciprocal compensation at the time the Agreement was executed." However, MCI WorldCom has objected to providing documents created either prior

or subsequent to the execution of the Agreement on the grounds that, according to MCI WorldCom, such documents are not relevant. MCI WorldCom is mistaken.

First, documents generated prior to execution of the Interconnection Agreement are clearly relevant to ascertaining the intent of the parties. For example, assume an employee of MCI WorldCom generated a memorandum in April 1996, shortly after passage of the Telecommunications Act of 1996, expressing MCI WorldCom's view that ISP-bound traffic was not subject to the payment of reciprocal compensation. This document could obviously be used by BellSouth to discredit MCI WorldCom's theory that the parties agreed to pay such compensation one year later, particularly when MCI WorldCom never even raised the issue during negotiations.

Second, the law in Tennessee is clear that the parties' conduct under a contract is relevant in ascertaining contractual intent. *See, e.g., Ballard v. North American Life and Cas. Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983) (the acts and declarations of the parties may be considered by the courts to determine the interpretation given by the parties themselves to a contract); *Bailey v. Brister*, 49 Tenn. App. 191, 353 S.W.2d 564 (1961) (practical interpretation of a contract by the parties thereto is entitled to great, if not controlling influence in interpreting that contract). As a result, documents created by MCI WorldCom after the Interconnection Agreement was executed that bear on MCI WorldCom's understanding of what that agreement meant are relevant and should be produced.

Request No. 6:

Produce all documents that refer or relate to any projections, estimates, studies, calculations, or budgets developed by or on behalf of MCI WorldCom that reflect the amount of reciprocal compensation MCI WorldCom expected to receive from BellSouth.

Response:

See previous response.

Request No. 7:

Produce all documents that refer or relate to any projections, estimates, studies, calculations, or budgets developed by or on behalf of MCI WorldCom that reflect the volume of calls MCI WorldCom expected to receive from BellSouth customers to Internet Service Providers served by MCI WorldCom.

Response:

See previous response.

The documents BellSouth seeks are directly relevant to the issues in this proceeding, notwithstanding MCI WorldCom's claims to the contrary. For example, MCI WorldCom claims that at the time it executed the Interconnection Agreement with BellSouth, MCI WorldCom understood that calls to ISPs constituted local traffic subject to the reciprocal compensation provisions of the agreement. BellSouth seeks to discover documents such as projections, estimates, studies, calculations, or budgets developed by or on behalf of MCI WorldCom that reflect the amount of reciprocal compensation MCI WorldCom expected to receive from BellSouth, which bear directly on the truth of MCI WorldCom's claim. For example, a 1997 budget reflecting that MCI WorldCom did not anticipate receiving reciprocal compensation from BellSouth, even though MCI WorldCom planned on providing service to ISP customers, would seriously undermine MCI WorldCom's position in this case, which may explain its reluctance to produce such documents.

II. CONCLUSION

For the foregoing reasons, the Authority should grant BellSouth's Motion to Compel and direct MCI WorldCom to respond completely and fully to BellSouth's discovery requests.

Respectfully submitted this 12th day of May, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight

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